UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Maritimes & Northeast Pipeline, L.L.C. Docket No. RP04-360-000

ORDER APPROVING CONTESTED SETTLEMENT

(Issued May 15, 2006)

1. On June 28, 2005, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) and other parties to the instant general section 4 rate proceeding[1] filed an offer of settlement (Settlement) to resolve all issues in the instant proceeding. The Presiding Administrative Law Judge certified the Settlement to the Commission as contested on August 24, 2005.[2] As discussed below, we will approve the Settlement.

I. Background

2. In 1996, the Commission authorized Maritimes to build pipeline facilities to transport gas from the United States-Canada border near Goldsboro, Nova Scotia, through Maine, New Hampshire, and Massachusetts to a terminus near Dracut, Massachusetts.[3] About 101 miles of the pipeline, from Westbrook, Maine, to Dracut, Massachusetts, is jointly owned with Portland Natural Gas Transmission System (Portland). At Dracut, the joint facilities interconnect with Tennessee Gas Pipeline

[1] The Sponsoring Parties include Maritimes, Mobil Natural Gas Inc. (Mobil), Boston Gas Company d/b/a KeySpan Energy Delivery NE (KeySpan), Salmon Resources Ltd. (Salmon), and Pengrowth Corporation (Pengrowth).

[2] *Maritimes & Northeast Pipeline, L.L.C.*, 112 FERC ¶ 63,019 (2005).

[3] *Maritimes & Northeast Pipeline, L.L.C.*, 76 FERC ¶ 61,124 (1996) (preliminary determination on non-environmental issues); *Maritimes & Northeast Pipeline, L.L.C.*, 80 FERC ¶ 61,136 (1997) (order issuing certificate), *order on reh'g*, 81 FERC ¶ 61,166 (1997). Maritimes proposed the construction of these facilities (Maritimes' Phase I Project) to provide transportation for the Sable Offshore Energy Project (Sable Project). 76 FERC at 61,667. The Sable Project was expected to make offshore Sable Island natural gas available to eastern Canada and the northeastern United States. *Id*.

Company (Tennessee). Maritimes later received authorization to construct what is referred to as Maritimes' Phase III Project by order issued April 13, 2001.[4] Under the Phase III Project, Maritimes constructed a pipeline that extended from an interconnect with the joint facilities mainline at Methuen, Massachusetts, some 25 miles to an interconnect with proposed facilities of Algonquin Gas Transmission Company (Algonquin) at Beverly, Massachusetts, at a projected cost of $133,995,000. Maritimes explained that the Phase III Project was designed, among other things, to provide its existing customers with greater access to growing northeastern markets, and that it notified its existing customers that they have the right to amend their service agreements to add the new Beverly interconnect on the Phase III Project facilities (Phase III facilities) as a new primary delivery point.[5] Maritimes was authorized to charge its existing rates for service on the Phase III facilities.[6] The Phase III facilities went into service on November 24, 2003.

3. On June 30, 2004, Maritimes filed a general rate increase under section 4 of the Natural Gas Act (NGA). Its section 4 filing proposed, among other things, to increase Maritimes' maximum recourse rates for mainline transportation service to reflect an increase in Maritimes' annual revenue requirement from $120,844,193 to $151,288,531. The increased revenue requirement, in turn, reflected the roll-in of the costs of its Phase III facilities. For example, under Maritimes' rate increase proposal, the maximum recourse reservation charge for firm, mainline transportation service under rate schedule MN365 (including service on the Phase III facilities) would increase from $21.1396 per Dth of entitlement to $32.5847 per Dth (from $0.6950 per Dth/d to $1.0713 per Dth/d on a 100 percent load factor basis), an increase of 54.14 percent from its existing rate. On July 29, 2004, the Commission accepted the filing, suspended it for five months, and permitted the proposed rates to become effective, subject to refund, on January 1, 2005,

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[4] *Maritimes & Northeast Pipeline, L.L.C.*, 95 FERC ¶ 61,077, at 61,219-20 (2001); *see also Maritimes & Northeast Pipeline, L.L.C.*, 96 FERC ¶ 61,077 (2001); *Maritimes & Northeast Pipeline, L.L.C.*, 99 FERC ¶ 61,277 (2002) (amending certificates).

[5] 95 FERC at 61,220.

[6] 95 FERC at 61,220, 61,227-28.

subject to the outcome of a hearing on the proposed rates.[7] Maritimes then negotiated the subject Settlement with several key shippers, avoiding the hearing, and filed the Settlement on June 28, 2005. Following the receipt of comments, the Presiding Administrative Law Judge (ALJ) certified the Settlement to the Commission as contested on August 24, 2005.[8]

4. Briefly, for an interim period, the Settlement provides for, among other things, a partial roll-in of 40 percent of Phase III costs in mainline rates, partial recovery of 20 percent of the Phase III costs in a volumetric surcharge, and deferral of the remaining 40 percent of Phase III costs. Until superseded by new rates, the Settlement results in an increased maximum recourse reservation charge for firm transportation service on Maritimes' mainline system under Rate Schedule MN365 relative to its pre-Docket No. RP04-360 rates,[9] including the Phase III facilities, of $23.725 per Dth (referred to in the Settlement as $0.78 per Dth/d on a 100 percent load factor basis), a $0.00 per Dth usage charge, and a maximum recourse volumetric surcharge for quantities transported on the Phase III facilities of $0.14 per Dth. If no quantities are transported on the Phase III facilities, then the Phase III surcharge will not be assessed. For firm service with a primary transportation path only on the Phase III facilities, the Settlement provides for a maximum recourse reservation charge of $7.30 per Dth of entitlement ($0.24 per Dth/d on a 100 percent load factor basis), a $0.00 per Dth usage charge, and a maximum recourse Phase III volumetric surcharge of $0.14 per Dth. Because the Settlement rates are below the filed rates, which went into effect, subject to refund, on January 1, 2005, the Settlement provides for refunds. The Settlement also provides for a rate moratorium and for Maritimes to file a new general section 4 rate case following a new mainline expansion if roll-in of the costs of the expansion would lower its system-wide rates.

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[7] *Maritimes & Northeast Pipeline, L.L.C.*, 108 FERC ¶ 61,087 (2004). The July 29, 2004 Order set the non-rate aspects of the filing for technical conference. *Id.* P 17-18. Following discussions among the parties, Maritimes filed, and the Commission accepted, revised tariff sheets addressing the matters set for technical conference. S*ee Maritimes & Northeast Pipeline, L.L.C.*, 109 FERC ¶ 61,238 (2004).

[8] *Maritimes & Northeast Pipeline, L.L.C.*, 112 FERC ¶ 63,019 (2005).

[9] Settlement rates for backhauls and for Rate Schedules MN151, MN90, MNOP, and MNIT are also attached to the Settlement in Schedule 1, and, as is the case for Rate Schedule MN365, are separately established for (a) service on Maritimes' mainline system, including the Phase III facilities, and (b) service on a transportation path that covers only the Phase III facilities.

II. Details of the Settlement

A. Overview

5. According to the Sponsoring Parties, the Settlement: (1) addresses the present and future treatment of costs associated with the Phase III facilities; (2) establishes mainline and lateral line recourse rates, as well as rates that apply to service on a transportation path that includes only Phase III facilities; (3) sets forth the depreciation rates for mainline and lateral facilities, and for intangible general plant; (4) establishes a rate moratorium and rate case comeback requirements; (5) removes the revenue-sharing mechanism from Maritimes' tariff; (6) allows each current long-term firm shipper a one-time right to eliminate the Beverly, Massachusetts interconnect between Maritimes and Algonquin from its firm service agreement; and (7) permits each current long-term firm shipper to elect to receive service pursuant to a negotiated or discounted rate that applies to any other long-term firm shipper.

6. The Sponsoring Parties explain that the Settlement provides for a reduction of Maritimes' filed mainline service rates. They add that if the Settlement is approved, it will lead to several benefits: (1) rate relief for all parties at an earlier date than litigation would have provided; (2) saving time and resources through the discontinuance of the litigation; and (3) removal of uncertainty involved in fully litigating the case.

B. Details of the Settlement

7. Section 1.1 of the Settlement specifies that the Settlement agreement will become effective on the first day of the first calendar month after Maritimes receives an acceptable order from the Commission -- one that approves the Settlement as filed and without conditions, or that is otherwise acceptable to the Settling Parties. The Settlement rates will become effective January 1, 2005.

8. Under section 1.2 of the Settlement, Maritimes will refund the difference between the settlement rates and the rates placed into effect as of January 1, 2005 ("interim rates"), plus interest, to each shipper that is paying the interim rates.[10] The refund period will extend from January 1, 2005, until the effective date of the Settlement.

9. Section 1.3 establishes settlement rates for service under Rate Schedule MN365. There will be separate rates for mainline service (including Phase III facilities) and service on Phase III facilities-only under Rate Schedules MN151, MN90, MNOP, and

[10] *See Maritimes & Northeast Pipeline, L.L.C.*, Docket No. RP04-360-002 (Dec. 22, 2004) (unpublished Letter Order).

MNIT. With regard to service under each firm service agreement for mainline service on a firm transportation path that includes any portion of Maritimes' mainline system upstream of Methuen, Massachusetts (i.e., Phases I and II), the firm shipper may release any mainline segment of capacity, including a transportation path that includes only Phase III mainline facilities. For any portion released, the shipper may receive any rate up to the maximum recourse rate under Maritimes' tariff for service under that agreement. As for service under firm service agreements for transportation only over Phase III transportation paths, the firm shipper shall not have the right: (1) to segment any portion of the Maritimes mainline system located upstream of Methuen, Massachusetts, or (2) to any secondary receipt and delivery point rights upstream of that point.

10. Section 1.3 also specifies that separate fuel retainage percentages -- one for deliveries upstream of the Richmond, Maine compressor station, and one for deliveries downstream -- will become effective at the time the Settlement does. These percentages will apply prospectively to service on the mainline system. Maritimes will recalculate the fuel retainage percentages for deliveries upstream and downstream of the compressor station, and the recalculated percentages will become effective prospectively. The percentages shall remain effective until the earlier of: (1) November 30, 2019, or (2) the time Maritimes places into effect rates in a rate case filed after an expansion in-service date, in which Maritimes proposes a single, system-wide maximum recourse reservation charge that is equal to or below $0.7700 per Dth/d on a 100 percent load factor basis for Rate Schedule MN365 service. The rate portions of section 1.3 terminate when new rates, compliant with section 1.7 of the Settlement, are made effective under sections 4 or 5 of the NGA.

11. Finally, section 1.3 specifies that the Public Advocate for the State of Maine shall appoint a trustee to establish, maintain, and administer an escrow account. The account will receive and distribute to Maine natural gas consumers proceeds of $750,000 per year (or a pro-rated amount for the portion of calendar year 2005 that falls after the effective date of the Settlement), which Maritimes will disburse annually until 2009.

12. Section 1.4 establishes the mainline depreciation rate at 2.40 percent. The existing depreciation rates for lateral lines and intangible and general plant will remain the same.

13. Under section 1.5, 40 percent of the net plant as of January 1, 2005, that is associated with Phase III will be rolled into system-wide recourse rates, and another 20 percent will underlie the Phase III surcharge. The remaining 40 percent of net plant will be deferred for ratemaking purposes and will accrue carrying charges monthly at Maritimes' cost of long-term debt. Maritimes agrees that the latter two categories shall not be recovered under agreements under Rate Schedule MN365 as rates pertaining to mainline services, except as otherwise allowed in the Settlement.

14. Section 1.6 provides that, prior to November 30, 2019, the treatment of Phase III costs shall continue past the end of the Rate Moratorium Period (which is defined in section 1.7). However:

- After the Rate Moratorium Period, Maritimes may recover, through the volumetric surcharge for transportation on Phase III facilities up to a maximum rate of $0.14/Dth, costs for recovery of: (1) the then-existing rate base underlying the Phase III surcharge; (2) the 40 percent of Phase III rate base deferred for ratemaking purposes; and (3) the amount in the Phase III-related deferred account.

- Within six months of a new Expansion In-Service Date,[11] Maritimes will file a section 4 rate proceeding that reflects a proposed single system-wide maximum recourse Reservation Charge of less than $0.7800 Dth/d computed on a 100 percent load factor basis ($23.725 per Dth reservation charge) for Rate Schedule MN365 service that eliminates the Phase III surcharge and the separate rates for Phase III-only service. Maritimes will roll the then-existing rate base amount for its entire mainline system, plus the amount in the Phase III-related deferred account, into a system-wide mainline cost of service. Parties to the instant proceeding have reserved specific rights to raise arguments about rate design, and about dividing Maritimes' mainline system into zones for rate design purposes; however, they agree not to oppose the inclusion of Phase III-related costs in a single, mainline cost of service.

15. Section 1.7 establishes a rate moratorium period that will last until December 31, 2008. During that time, all parties waive their rights to attempt to change the Settlement Rates under sections 4 and 5 of the NGA, as applicable.

16. Section 1.8 removes section 33 from the General Terms and Conditions of Maritimes' tariff (i.e., Phase III Only Service Revenue Credits), and creates a new revenue-sharing mechanism. Under the new mechanism, all firm transportation revenues will be shared with mainline shippers of record for each 12-month period ending on July 31. For the first $5 million of revenue, Maritimes will retain 50 percent and credit the other 50 percent to shippers; for amounts above $5 million, Maritimes will retain

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[11] The Expansion In-Service Date is defined as the earlier of: (1) the in-service date of a new mainline expansion project in which the construction of the project facilities is not phased; (2) the in-service date of the final phase of a new mainline expansion project, if the project is constructed in phases; or (3) one year from the in-service date of the first phase of a new mainline expansion project.

25 percent and credit the other 75 percent to shippers. The amounts credited will include interest as set forth in section 154.501(d) of the Commission's regulations, 18 C.F.R. § 154.501(d) (2005). The new revenue-sharing mechanism will terminate when new rates are established under section 4 or 5 of the NGA that comply with the limitations specified in section 1.7.

17. Under section 1.9, Maritimes agrees to file a rate case under section 4 of the NGA that is consistent with section 1.6. If there is a new expansion and "Expansion In-Service Date," Maritimes will file its rate case within 6 months of that date; if not, then the deadline will be May 1, 2009, unless Maritimes can demonstrate that an Expansion In-Service Date will occur within a period of time acceptable to its firm shippers. Finally, as part of any rate case comeback where the proposed mainline recourse reservation charge for Rate Schedule MN365 is less than $0.78 per Dth/d, Maritimes will ask the Commission to authorize it to place the rates proposed in the rate case comeback into effect immediately.

18. Section 1.10 provides that specific shippers who use the Beverly, Massachusetts interconnect with Algonquin as a primary point of delivery under Rate Schedule MN365 agreement shall have the one-time option to remove that interconnect as a primary point of delivery. The option must be exercised within 60 days of the Expansion In-Service Date, and in no event later than December 31, 2008.

19. Section 1.11 creates "most favored nations" status for each shipper with whom Maritimes has an existing firm service agreement that provided contractual support justifying the original Maritimes Project facilities from an economic standpoint for Maritimes. Those shippers shall have rights specified in an attachment to the Settlement. Any capacity released by a firm shipper that has exercised most favored nations rights may be released subject to the condition that it is released at a rate not in excess of the rate that applies to the shipper's service agreement, such that the most favored nations benefit will be more effectively passed through the broadest possible market.

20. Article II provides general terms and conditions governing the establishment and interpretation of the Settlement. The Settlement provisions are non-severable under section 2.1. Section 2.2 provides that the Settlement represents the entire agreement of the parties with regard to the matters resolved therein, and only the matters addressed therein. It is not intended to constitute precedent or (with the exceptions of sections 1.5 and 1.6) "settled practice," as that term was interpreted in *Public Service Commission of New York v. FERC*.[12]

[12] 642 F.2d 1335 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 880 (1981).

21. Under section 2.3(A), the parties define “Acceptable Order” as a Commission order that approves the Settlement as filed and without condition. If the Commission issues such an order, then the Settlement will become effective as specified in section 1.1. If the Commission issues an order that materially modifies the Settlement, or that approves the Settlement with a material modification or condition, then each Sponsoring Party (which for this section includes those who, in their filed comments, either supported or did not oppose the Settlement) who is affected in a material and adverse way must, within 10 days of the order, provide the other Sponsoring Parties and the Commission with written notice of whether the order is acceptable to that Sponsoring Party. If the order is not acceptable, then the Sponsoring Party must indicate whether it intends to seek rehearing or court review. Should all the Sponsoring Parties indicate that the order is acceptable, then the order will be considered an Acceptable Order and the Settlement will become effective in accordance with section 1.1. However, if any Sponsoring Party that is materially and adversely affected by any such order indicates that the order is unacceptable, then the Settlement will not become effective until: (1) each Sponsoring Party who is adversely affected has notified the other Sponsoring Parties that the order is acceptable; or (2) the Commission or a reviewing court cures the adverse modification or condition. Sponsoring Parties for whom the order is unacceptable have the right to terminate the Settlement by written notice to the other Sponsoring Parties at any time before the Commission or a court cures the adverse condition. Under section 2.3(B), similar provisions are applied if, after the Settlement becomes effective, the Settlement is materially modified or approved with a modification or condition when: (1) the Commission issues an order on rehearing of an Acceptable Order; (2) a court issues an order on review of an Acceptable Order or related rehearing order; or (3) the Commission issues an order on remand from the reviewing court. However, in such an event, the Settlement will remain in effect until an adversely affected Sponsoring Party provides notice to terminate it, or until the Settlement has otherwise terminated on its own terms.

22. If a Sponsoring Party gives notice of termination after the effective date, the Settlement will be deemed null, void, and of no force or effect (with limited exceptions). In that circumstance: (1) the provisions of section 1.1 will apply to impose retroactive surcharges payable by all shippers, so that Maritimes will recover the difference between the Settlement rates and the rates placed into effect as of January 1, 2005, plus interest; (2) the “Beverly Turnback Right” described in section 1.10 will be invalid, and each existing firm shipper shall have the Beverly Interconnect reestablished as a primary point of delivery; (3) the “most favored nations” clause in section 1.11 will be invalid, so rates payable under the firm service agreements will be those that would have been effective without the “most favored nations” clause; and (4) other actions shall be taken to put parties in the positions they would have occupied absent the filing and the approval of the Settlement.

23. Section 2.3(C) provides that a Sponsoring Party is not obligated to pursue rehearing or judicial review, or to continue to do so, before providing a final termination notice. A final termination notice will terminate the Settlement on the date of such notice, and all Settlement provisions will be deemed null and void. Under section 2.3(D), upon issuance of a final termination notice, Maritimes and the Sponsoring Parties agree to file a motion with the Chief Judge, the Presiding Administrative Law Judge, or the Commission, as appropriate, to establish new procedural dates for the hearing ordered in this docket.

24. Under section 2.4, Maritimes will file revised tariff sheets to implement the Settlement within 20 days of the effective date. Section 2.5 provides that all sections of the Settlement will become effective on the effective date. Sections 1.5, 1.6, 1.9, and 1.11 will terminate on November 30, 2019; all others will terminate when rates that comply with section 1.7 become effective for Maritimes in a proceeding under either section 4 or 5 of the NGA.

25. Section 2.6 specifies that the terms of the Settlement are contractual, and that the Settlement may not be construed against any party as the drafter. The parties agree in section 2.7 not to take any action, directly or indirectly, that would interfere with others' performance of the Settlement or that would adversely affect any rights created by the Settlement. Section 2.8 provides that capitalized terms not otherwise defined should be defined as they are in the General Terms and Conditions of Maritimes' tariff. The provisions of the Settlement are binding upon the parties' successors and assignees under section 2.9.

26. Article III of the Settlement provides that the Commission's approval shall constitute: (1) a finding that the Settlement is fair and reasonable and in the public interest; (2) termination of this proceeding; and (3) any waivers of the Commission's rules and regulations that are needed to effectuate the Settlement in accordance with its terms. As of the effective date, Maritimes' rates shall no longer be subject to refund.

III. Comments

27. As detailed below, eight parties filed comments on the Settlement: Maritimes, Firm Shippers,[13] Andarko Petroleum Corporation (Anadarko); H.Q. Energy Services (U.S.) Inc. (HQ Energy); Massachusetts Department of Telecommunications and Energy; Portland Natural Gas Transmission System (Portland); Repsol LNG, S.L. (Repsol); and

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[13] Firm Shippers include Mobil, KeySpan, Salmon, and Pengrowth; *see also supra* note 1.

Trial Staff. Maritimes, Anadarko, Firm Shippers, Portland, Repsol, and Trial Staff filed reply comments. Portland filed an answer to Maritimes' reply comments, and Maritimes filed a motion for leave to answer and an answer thereto. The Settlement Judge certified the Settlement as contested on August 24, 2005.

A. Initial Comments

28. Portland contends that the Settlement Phase III-only rate is anticompetitive, unduly discriminatory, unjust and unreasonable, unsupported by record evidence, and inhibits integration of the Northeast pipeline infrastructure. Moreover, it asserts, such a rate results in an economic barrier to alternate supply access. In the event the Settlement is approved, Portland proposes modifications to it. Portland states that Phase III is capable of enhancing competitive supply options in the Northeast market. It notes that when Maritimes sought a construction certificate for Phase III, Maritimes cited (and the Commission relied upon) expected benefits such as: (1) increased access to a variety of gas supplies; (2) a new link to upstream pipelines, such as Portland; and (3) greater competition in the Northeast region due to the greater access to natural gas supplies. Portland further states that Congress and the Commission are concerned that supply constraints and bottlenecks may adversely impact the adequacy and reliability of the Northeast natural gas infrastructure. In order to address these deficiencies, Portland asserts that additional gas supplies from Western Canada and the Dawn Hub could be accessed through Portland's system and Phase III; however, it believes that various Settlement provisions erect economic barriers to accessing alternate supplies in this manner.

29. Portland first argues that, while it supports establishing an incremental Phase III-only rate, the Phase III rate established in section 1.3(A)(ii) of the Settlement, which it describes as $0.38 per Dth,[14] is discriminatory, non-cost based, and unsupported by record evidence. In its response to a data request, Portland states that Maritimes itself

[14] The $0.38 rate is derived, mathematically, by converting the $7.30 Phase III reservation charge to a volumetric rate of $0.24 per Dth/d on a 100 percent load factor basis and then adding the Phase III volumetric surcharge of $0.14 per Dth, also assuming a 100 percent load factor. Accordingly, the $0.38 rate assumes that the shipper uses 100 percent of its contract demand entitlement 365 days a year, such that it pays the Phase III volumetric surcharge for the same volumes 365 days per year. Although no shipper would be expected to reflect that level of use, the $0.38 rate is used as a convenient way to compare the various rates at issue in this proceeding.

calculated an incremental cost of service for Phase III facilities of $0.243 per Dth,[15] which Portland states Maritimes later lowered to $0.234 per Dth in rebuttal testimony. Portland explains that those rates included a greater depreciation rate than provided for in the Settlement, as well as the use of Maritimes' firm contract demand level for throughput rather than the Phase III capacity level. Portland states that Trial Staff proposed an incremental rate of $0.145 per Dth, and Firm Shippers proposed an incremental rate of $0.149, both based on reductions to Maritimes' Phase III cost of service and higher throughput.[16] Portland notes that its own calculation of a Phase III incremental rate was $0.211/Dth, based on the Phase III incremental cost of service Maritimes provided.[17] If the Commission modifies, rather than rejects, the Settlement, Portland requests the Commission make two adjustments that will bring the rate to $0.173: (1) reduce the depreciation rate for the mainline and Phase III to 2.4 percent; and (2) as the Settlement reduces transportation rates, adjust the equity return to 11.59 percent, which is midway between Maritimes' proposed 14.25 percent and Trial Staff's proposed 8.93 percent.[18]

30. Second, Portland alleges that the economic barrier to accessing alternate supplies through Phase III will increase with Maritimes' next rate case, because sections 1.3(E) and 1.6(B) of the Settlement provide for the elimination of Phase III-only rates. At that point, Portland says, shippers moving gas on Phase III will have to pay the rolled-in rate applicable to Maritimes' entire system. According to Portland, that rate is estimated to be $0.77 per Dth/d at the time of Maritimes' next rate case, whereas Phase III-only service should not cost more than $0.14 to $0.23 per Dth/d. Portland argues that this is particularly unfair to shippers accessing Phase III from Portland's system because those shippers already pay Portland's system rate to ship gas to the interconnection of Phase III with the Portland/Maritimes joint facilities. Portland cites the testimony of its own witness, and of Trial Staff's witness, to support its conclusion that this rate structure will discourage Portland's shippers from using Phase III.

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[15] Portland Initial Comments at 12 (citing Maritimes' response to Trial Staff's Data Request COS-1 No. 10, contained in Attachment C, Ex. PNGTS-3).

[16] *Id*. at 14.

[17] *Id*. at 13.

[18] *Id*. at 13-14 & Attachment B.

31. Portland contests the argument of a Maritimes witness that the capacity release market will continue to provide a discrete rate and service for Phase III. Portland alleges that Maritimes' firm shippers do not release capacity to competing shippers, so secondary market releases are not a viable way to access Phase III. As Sable Island production is declining, and Maritimes' capacity is underused, Portland states that it is especially important for the Commission not to allow economic barriers to Phase III access by alternative sources of gas supply.

32. Portland indicates that in addition to itself and Trial Staff, every other intervenor that addressed the Phase III rate design opposed roll-in and supported an incremental rate design. It alleges that the roll-in is unreasonable, anticompetitive, and inconsistent with the Commission's Policy Statement for new pipeline construction.[19]

33. Third, Portland argues that the anticompetitive provisions of the Settlement take on more significance because there is no secondary market competition on Maritimes' system. It notes that Maritimes does not discount services on its system, that Maritimes' firm shippers do not release capacity at discounted rates, and that firm shippers will not release capacity to shippers moving non-Sable Island gas supplies, even at maximum rates. Portland advocates that the Commission must ensure that the design and pricing of primary services on Maritimes' system adequately promote competition and alternative supply access, because Maritimes' system lacks a competitive secondary market for unused capacity. Portland adds that the Commission has found that diminished secondary-market competition tends to raise prices.[20] It argues that Commission objectives for developing more competitive gas commodity and transportation markets are not being met on the Maritimes system, given the lack of discounting and secondary market competition. It states that this reinforces the need for the Commission to ensure that Maritimes' primary services are priced so as to promote gas-on-gas and pipeline-to-pipeline competition, especially for Phase III-only service.

34. Portland notes that section 1.6(B) of the Settlement limits the Phase III rate design issues that can be raised in Maritimes' next rate case, such as: (1) precluding parties from arguing for a rate design that will have the effect of incrementally pricing Phase III; and (2) barring parties from opposing a mainline rate design that will roll the then-existing base rate amount for Phase III into a mainline cost of service, if the system-wide

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[19] *Id*. at 18 (citing *Certification of New Natural Gas Pipeline Facilities, Statement of Policy*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)).

[20] *Id*. at 21 (citing *Policy for Selective Discounting by Natural Gas Pipelines*, 111 FERC ¶ 61,309, at P 41 (2005)).

recourse reservation rate is less than $0.7800/Dth. Portland argues that these provisions are anticompetitive and unreasonable because they would lock in the economic barrier of a rolled-in system-wide rate for Phase III-only service, and preclude any arguments to the contrary.

35. Portland contends that, if the Commission approves the Settlement, then the Settlement should be modified according to the *Trailblazer* precedent.[21] Portland argues that the Commission held in *Trailblazer* that a threshold issue in evaluating a settlement is whether it promotes competition. The *Trailblazer* policy, it asserts, requires modification of the Settlement because the Settlement inhibits gas-on-gas and pipeline-to-pipeline competition in Northeast gas markets by erecting an economic barrier to alternative supply access to Phase III from Portland and other upstream pipelines.

36. Portland alleges that, in addition to failing the threshold test of producing an outcome that is consistent with the public interest and that promotes competition, the Settlement cannot be approved under any of the four approaches discussed in *Trailblazer*. With respect to the first approach, Portland states that the Commission may approve a contested settlement where there is an adequate record and each contesting party's contentions lack merit.[22] In this case, Portland avers that the record does not support the contested Settlement provisions, but it does support Portland's contentions. With respect to the second approach, Portland states that the Settlement will not provide an overall just and reasonable rate, because an appropriate Phase III rate of $0.14 to $0.17/Dth would be significantly lower than the Settlement Phase III-only rate of $0.38/Dth. With respect to the third approach, Portland argues that the Commission cannot take the approach that the Settlement provides an overall benefit, and that the contesting party's interest is too attenuated.[23] It states that its interest is not attenuated because: (1) market participants have expressed interest in moving gas from Portland across Phase III to Algonquin; and (2) the Settlement imposes a rolled-in Phase III rate and prohibits parties from arguing against that rate in Maritimes' next rate case. Finally, with respect to the fourth approach, Portland submits that severance of a party is not an option, because while it would allow the settling parties to receive the benefit of their bargain, that very bargain is

[21] *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999), *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

[22] *Id*. at 26 (citing *Trailblazer*, 85 FERC at 62,342).

[23] *Id.* (quoting *Trailblazer*, 85 FERC at 62,343).

unreasonable and aggrieves Portland. Portland adds that, as the Commission has found in the past, severance is generally inappropriate where the contesting party is a competing pipeline.

37. Next, Portland argues that the Commission must abide by court standards for approval of settlements. It argues that the Commission must not: (1) discount objections to a settlement raised by a competitor, particularly when the competitor alleges that a settlement raises barriers to competition; (2) use its general preference for settlements as a basis for approving any particular settlement; (3) approve a settlement on the basis that most of a pipeline's customers support it; or (4) fail to consider whether the settling parties' interests are congruent with those opposing the settlement.[24]

38. If the Settlement is approved, Portland argues that it should be modified in accordance with *Trailblazer*.[25] Specifically, Portland argues that the Commission should: (1) replace the Phase III-only rate with a cost-based, nondiscriminatory rate based on the incremental costs of Phase III; (2) require that Phase III-only service be a separate rate schedule in Maritimes' tariff; and (3) eliminate the provisions of sections 1.3(E) and 1.6(B) that provide for elimination of Phase III-only rates in Maritimes' next rate case and that preclude any arguments for incremental pricing of Phase III, and require that Phase III-only service be included in section 2.2 as a "settled practice" and in section 2.5 as a provision that survives the term of the Settlement. The Commission should make these modifications, Portland argues, even if it approves the roll-in of some or all of the Phase III costs into Maritimes' system-wide rate.

39. HQ Energy states that it owns the largest interest in a natural gas fueled electric cogeneration facility in Maine that receives its entire gas supply from Maritimes' Bucksport lateral pipeline and its fundamental interest in this proceeding has been to reduce the cost of transporting gas to the Bucksport Plant. It states that, because the Bucksport Plant is located only 90 miles from the inception of Maritimes' system at the Canadian border and does not utilize the remaining 240 miles of Maritimes' system, it has been advancing the position that rates for Maritimes' mainline should be zoned and rates for the Phase III facilities should be incrementally priced. HQ Energy states that, although it is not opposed to the rates, rate design, and various provisions of the Settlement to the extent they are applied to Maritimes' current system operations and services, it is concerned that what it asserts is "certain vague and undefined language" in

[24] *Id*. at 28-30 (citing *NorAm Gas Transmission Co. v. FERC*, 148 F.2d 1158, 1164 (D.C. Cir. 1998); *Laclede Gas Co. v. FERC*, 997 F.2d 936, 945-46 (D.C. Cir. 1993); *Southern Cal. Edison Co. v. FERC*, 162 F.3d 116, 119 (D.C. Cir. 1998)).

[25] *Id*. at 23.

the Settlement could be broadly construed to significantly restrict positions on rates and rate design in Maritimes' future expansion certificate proceeding. Accordingly, it states that it is filing comments in an effort to clarify that the Settlement and settlement rates will not be deemed dispositive of parties' positions on rates and rate levels in the event of a major expansion on Maritimes. It states that, while it does not oppose the Settlement's restriction in section 1.6(B) (which prohibits advocating incremental pricing of Phase III in a future rate proceeding), it does not believe the Settlement should be interpreted as broadly restricting parties in Maritimes' expansion certificate case from advocating other positions on rates and rate levels.

40. HQ Energy states that, while the Settlement adopts a non-cost-based incremental rate for transportation on Phase III prior to Maritimes' post-expansion rate filing, it provides for rolled-in treatment of the Phase III costs from the effective date of the rates proposed in such a filing until November 30, 2019, and prohibits parties from opposing such treatment. HQ Energy adds that the Settlement also qualifies parties' ability to advocate dividing Maritimes' mainline system into zones for rate design purposes, and that such rate changes may be made effective prospectively only after Maritimes post-expansion rate case has concluded. HQ Energy states that such restrictive interpretations could arise from an assertion that: (1) Section 2.7, in conjunction with the rate moratorium provisions of section 1.7, prevents parties from even advocating that any changes to rates be made before January 1, 2009; or (2) Section 2.7 prevents parties from advocating positions that would adversely affect Maritimes' right to charge settlement rates for all services until it files a post-expansion rate case; or (3) advocating rate changes in the expansion certificate proceeding interferes with the performance of section 1.6(B) of the Settlement. HQ Energy further claims that Maritimes is not required to file another general section 4 rate case unless it proposes a rate reduction based on rolling in the cost of a future expansion.[26] On the assumption that Maritimes files a rate decrease following an expansion, and then the Commission later orders a prospectively-effective rate reduction below the level of the pre-existing Settlement rate, HQ Energy claims it is concerned that the Settlement removes any refund obligation in such a future rate case because the pre-existing Settlement rate will be the refund floor in that case.

B. Reply Comments

41. In its reply comments, Maritimes argues that neither Portland nor HQ Energy raises any material issue of fact, and that the record is sufficient to reject the objections of Portland and HQ Energy on the merits and approve the Settlement without modification. Maritimes states that the two arguments raised by Portland -- that (1) the assertion that

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[26] HQ Energy Initial Comments at 8.

the level of the Phase III-only rate is anticompetitive, and (2) the discontinuance of this special rate after the next rate case is anticompetitive -- should be rejected.

42. Maritimes argues that Portland is attempting to obtain a free option from Maritimes and a subsidy from Maritimes' shippers without ever subscribing for firm capacity on Phase III. Maritimes states that it did not build, and the Commission did not certificate, Phase III for the benefit of Portland. Maritimes states that its existing firm shippers have borne the risk of actually building Phase III and creating the inexpensive expansibility associated with the project. The construction of Phase III enabled Maritimes to expand its mainline system, including Phase III, in an efficient and inexpensive manner for the benefit of its existing shippers. Maritimes contends that, with the permanent special rate Portland seeks, Portland and its shippers would always have the free option to transport gas on the Phase III facilities at a substantial savings over the system-wide rate whenever the market in Boston is favorable, without ever subscribing for capacity on Phase III on a firm basis.

43. In addition, Maritimes argues that Portland has mischaracterized the effect of the Settlement. Maritimes argues that the Settlement contemplates a return to Maritimes' historical system-wide rates; the temporary, special Phase III-only rate was included only as a concession to Portland. The Settlement is designed to balance the interests of current and future users of the system as Maritimes transitions from a system that transports primarily Sable Island supplies to substantial quantities of LNG, according to Maritimes.

44. Maritimes also states that the partial roll-in costs (40 percent of the Phase III costs into mainline rates and 20 percent into a separate volumetric surcharge) is an interim measure that is intended to apply only until Maritimes attracts a major new supply source and Maritimes has placed into service a major mainline expansion. Maritimes notes that the Phase III-only rate is a special rate agreed to between Maritimes and the Sponsoring Parties to gain Portland's support for the Settlement.

45. Maritimes further argues that the Settlement is designed to deal with the current transition facing Maritimes, i.e., from being a pipeline that transports Sable Island supplies to a pipeline that transports primarily LNG supplies. Maritimes argues that the development of LNG import facilities and system expansion would increase throughput, promote gas-on-gas competition, and bring rate stability and certainty to the system. Maritimes argues that the relief requested by Portland would harm its ability to attract LNG import terminals to its system and would negate the benefits attributable to the Settlement.

46. Maritimes states the Commission is not obligated to consider Portland's section 5 arguments and may approve the Settlement without ruling on them. Further, Maritimes believes that the Commission can and should approve the Settlement on the basis of its

prior orders certificating Phase III. Finally, Maritimes states that if the Commission must look beyond those prior orders, the Settlement is acceptable under any of the first three approaches consistent with *Trailblazer*.

47. Maritimes notes that, according to *Trailblazer,* the Commission could approve a contested settlement upon finding that the settlement package, as a whole, is just and reasonable. Maritimes also notes that the Commission need not find that "the settlement rate is exactly the rate the Commission would establish on the merits after litigation. . . . The Commission need only find that the overall package, resulting from the give and take of the bargaining which led to the settlement, falls within the range."[27]

48. Maritimes states that the Commission also could approve the Settlement on a merits decision on each contested issue. Maritimes argues that there is no evidence in the record to support the assertion that the Settlement is anticompetitive. Portland has pointed to no evidence that there is a market of any kind for deliveries from Portland into Phase III facilities, according to Maritimes. Maritimes states that the only evidence of a market is the assertion from J. Stephen Gaske, a non-company witness, who provided no written evidence or a witness with first-hand knowledge that inquiries were received for using Phase III facilities in conjunction with service on Portland. Maritimes avers that Portland's claim that the Phase III-only rate and the discontinuance of such rate in a future rate case causes an anticompetitive effect on the market is nothing more than speculation. Maritimes argues that Portland has not met its section 5 burden of proof to establish that its proposal -- the establishment of a lower, permanent Phase III-only rate -- is just and reasonable, has not provided evidence showing precisely what its lower proposed rate would be, and has not shown that such rate would create competition.

49. Maritimes further argues that it is Portland's request for rejection of the Settlement which is anticompetitive. Maritimes explains the Settlement is designed to deal with the transition of Maritimes from being a pipeline that transports Sable Island supplies to a pipeline that transports primarily LNG. All participants filing initial comments in support of the Settlement acknowledge that the Settlement contemplates the development of LNG import facilities which will increase throughput on the system creating lower rates for all shippers and supply security for gas consumers who rely on Maritimes. By promoting the development of LNG, the Settlement is promoting gas-on-gas competition and is thus pro-competitive, not anti-competitive.

[27] *Trailblazer*, 85 FERC at 62,343.

50. Maritimes contends that the Settlement rates fall within the acceptable range. Maritimes states that its mainline firm service rate prior to the rate filing was $0.695 per Dth/d, with a proposed increase to $1.0713 per Dth/d. The Settlement rate for service on the mainline is $0.78 per Dth/d with a $0.14 per Dth/d surcharge for deliveries on the Phase III facilities. Maritimes also states that the Phase III-only rate is $0.24 per Dth/d,[28] which is also within the range of rates proposed in this proceeding.

51. Maritimes states that other benefits of the Settlement include only a partial roll-in of Phase III costs (40 percent underlying the mainline rate and 20 percent underlying the Phase III surcharge), the rate case comeback requirement, the avoidance of costly litigation and risk of an outcome adverse to one's interests, the opportunity to pay a lower rate now, and the establishment of a rate moratorium. None of which would be possible in a fully litigated case, according to Maritimes.

52. Maritimes argues that Portland's interest is attenuated as Portland has presented no evidence on how the Settlement would harm Portland. Maritimes explains that the Settlement is beneficial to all of its shippers and will help attract LNG developers to Maritimes, which in turn will bring more total gas supply into the Northeast market. Maritimes states that Portland has not provided any evidence that Portland or its shippers would use the route from Methuen to Beverly, at any rate. Further, Maritimes contends that Portland has provided no evidence to support its claim that the Phase III-only rate and that the future discontinuance of that rate will have an anticompetitive effect to Portland's detriment. Therefore, Maritimes maintains that Portland's position is too attenuated to be allowed to derail the Settlement. Finally, Maritimes notes that as explained in *Trailblazer*, Portland will have another forum in which to raise its contentions following the filing of its future rate case.[29]

53. In response to HQ Energy's apparent argument that HQ Energy should not be precluded from seeking incremental pricing of the Phase III facilities in a future expansion certificate case, Maritimes states that, to the extent HQ Energy is requesting that the Commission somehow conduct a review of Maritimes' existing rates in a certificate proceeding, such a result would be extremely impractical, contrary to existing law and policy, and would violate the rate moratorium of the Settlement. Further,

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[28] As noted, the Settlement actually provides that the Phase III-only rate is the $0.24 per Dth/d reservation charge on a 100 percent load basis plus the $0.14 per Dth Phase III volumetric surcharge.

[29] *Id*.

Maritimes argues that it would require the Commission to unlawfully modify Maritimes' system-wide rates in a certificate case without the requisite rate case section 4 and 5 findings, in violation of the court's holding in *Panhandle*.[30]

54. Regarding HQ Energy's request for "clarification" in general, Maritimes states that "[HQ Energy] has not proposed any language, and it is not clear whether it would want to modify or clarify section 1.6(B), section 1.7, or section 2.7 of the Settlement, or whether it would want a combination of modifications and clarifications to those sections." Maritimes also states that the Settlement's provisions are precise, that they were carefully negotiated, and that they reflect the agreement of all parties supporting or not opposing the Settlement.

55. In its reply comments, Portland contends that the Settlement can be modified to eliminate its anticompetitive provisions without upsetting the essential Settlement bargain. Portland remarks that the possibility of future LNG or other new supply sources on Maritimes' system does not alter the need for nondiscriminatory cost-based pricing of Phase III-only service. In fact, it asserts, substantial amounts of unused Phase III capacity, and Maritimes' acknowledged need for alternative supplies, underscore the appropriateness of a cost-based Phase III-only rate that will provide efficient access for all potential supply sources, according to Portland.

IV. Certification

56. The ALJ observed that, under Rule 602, a contested settlement may be certified to the Commission if the presiding officer determines that there are no genuine issues of material fact and if the presiding officer determines that omission of the initial decision is appropriate and determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.[31] The ALJ stated that the Settlement is certified under both criteria.

57. The ALJ found that both Maritimes and Commission Trial Staff are correct that the allegations raised by Portland do not raise any genuine issue of material fact. He observed that Rule 602(f)(4) requires that all comments contesting an offer of settlement must be accompanied by an affidavit detailing genuine issues of material fact that are supported by reference to documents filed in the case. 18 C.F.R. § 385.602(f)(4). The ALJ notes that Portland included initial testimony that had already been filed in this case,

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[30] *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1980) (*Panhandle*).

[31] 18 C.F.R § 385.602 (h)(2)(ii), (iii) (2005).

but which does not specifically address the Settlement that was filed in this docket. Therefore, the ALJ concludes that Portland's initial comments fail to satisfy the requirement established by the Commission for making a valid objection to the Settlement. Thus, he held, Portland's objections can be rejected solely on procedural grounds. However, he stated, for the sake of completeness of the record, he analyzed the merits of the objections. In that regard, the ALJ held that the arguments raised by Portland are in the nature of policy considerations regarding competition, or its access to the Phase III facilities, which he held are issues that can be resolved by the Commission.

58. Furthermore, the ALJ held that Firm Shippers are correct that the Settlement can be certified following criteria from the *Trailblazer* precedent. For instance, there is ample evidence in this record for the Commission to reach a decision on the merits, citing 18 C.F.R. § 602(h)(ii). The ALJ held that the Commission can determine whether the Settlement provides an overall just and reasonable result. Additionally, he held, the Commission can determine that the benefits of the Settlement outweigh the nature of the objections and that the contesting party's interest is too attenuated. *Trailblazer* at 62,342-43. The ALJ also held that, as Trial Staff asserts, the Commission may render a decision based on the extensive rate information provided by the parties in this case.

59. The ALJ observed that the Settlement disposes of all the contested issues in a manner acceptable to all shippers, Trial Staff, and relevant state agencies, and that Portland is not a shipper on the Maritimes system but rather a competitor. The ALJ stated that, as Firm Shippers point out, the Settlement does not appear to be detrimental to competition. The ALJ also stated that there are pipeline paths capable of delivering gas to Northeast markets; the Settlement does not interfere with gas supply alternatives for Maritimes customers.[32] Nor does the Settlement preclude Portland, he held, from using the Maritimes Phase III facilities in any manner. Moreover, he found, the Settlement provides a significantly reduced rate for which Portland can afford itself access to markets attached to Maritimes in the areas of its concerns. As the commenters in support of the Settlement generally recognize, the Settlement has created for the first time a Phase III-only rate for the explicit purpose of benefiting Portland. Portland's argument that the resultant rate is not low enough is not a reason in and of itself to deny certification of the Settlement or force modification thereof.

60. In addition, the ALJ found that Portland will be able to contract for service on the Phase III facilities at a rate below the mainline rate ($0.38 per Dth/d on a 100 percent load factor). The ALJ added two salient points: (1) this provision would probably not

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[32] The ALJ noted, for example, that Keyspan purchases more than 100 Bcf of western Canadian supplies to meet its franchise obligations throughout the northeast.

have been achieved by litigation; (2) there is no record evidence that Portland has a genuine interest in becoming a shipper on Maritimes' system. However, on the merits, the ALJ stated that Maritimes is also correct that there is no evidence in this record to support the arguments that the Settlement will produce anticompetitive effects or that the rate is unjust or unreasonable. The ALJ stated that the record does support, however, that firm shippers will be paying $0.78 per Dth/d reservation charge on a 100 percent load factor basis, which reserves capacity on Phase III. He observed that there is a $0.14 per Dth/d volumetric surcharge for using any portion of Phase III facilities. He also observed that Portland and its shippers, or shippers receiving gas from them, would pay the Phase III-only rate (with receipt and delivery points solely on the Phase III facilities), which has a reservation charge of $0.24 per Dth/d. Moreover, the ALJ stated, Portland will have other forums to raise the rate issue; in Maritimes' next rate case or after the rate moratorium it can file an NGA section 5 complaint challenging the rate design and cost allocation.[33]

61. The ALJ stated that, as Maritimes argues, the Settlement balances the interests of current users of the system and future users as it transitions to a system that will transport substantial quantities of LNG supplies. Once a major system expansion occurs, he noted, Maritimes will have a single system-wide rate for its entire system, including Phase III. As pointed out by Maritimes, the ALJ stated that the single system-wide rate encourages LNG development and allows lower rates for existing shippers. He also stated that the Settlement will encourage gas-on-gas competition by promoting the development of LNG facilities. Quoting Trial Staff, the ALJ stated that development of LNG facilities "would increase throughput, decrease rates and increase supply security."[34] The likelihood of this happening is high, he reasoned, since Maritimes has executed precedent agreements with potential developers of two import terminals. The ALJ observed that the Settlement has been structured to attract LNG developers, thus facilitating the movement of alternative gas supplies. Trial Staff correctly points out, he concluded, that this needs to be weighed against the "somewhat speculative" arguments raised by Portland (that an even lower incremental rate on Phase III will bring additional gas supplies to the

[33] The ALJ stated that, to the extent the Settlement facilitates expansion of Maritimes' system, the parties agree that this provides benefits, such as lower rates for firm and interruptible shippers, long-term supply security for customers on the northern end of the system, availability of new supply sources to Maritimes customers and customers downstream of Maritimes, and enhanced long-term financial viability of the pipeline.

[34] Trial Staff Initial Comments at 3.

Northeast from western Canada by way of Portland).[35] Indeed, the ALJ stated that Portland has not presented any concrete evidence to support this claim. Moreover, the ALJ concluded, as mentioned above, the Settlement improves Portland's ability to do just what Portland says the document prohibits. He stated that, given the void in substantiating the claim of Portland's anticompetitive concerns as well as the lack of capacity release activity on the Maritimes system, one can only conclude, at this time, that no market has materialized for such western Canadian natural gas supplies through Maritimes. In reality, it is Portland's arguments, he concluded, that would alter the balance of the Settlement grossly in its own favor to the detriment of the process.

62. The ALJ found that Portland does benefit from the Settlement, as it has a Phase III-only rate for the first time.[36] He stated that this is a significant concession in the Settlement for Portland, which appears to undermine its argument that the Settlement represents an economic barrier. Although the Settlement prevents the parties to this proceeding from arguing for an incremental rate for Phase III in the next rate case, he added, they will be able to argue for a zoned rate or other special rate in the next rate case.[37] Additionally, the ALJ stated that, if the system expands as expected, the rates on Maritimes' system are likely to be reduced even further in the subsequent rate case, which will benefit Portland and all shippers. Further, the ALJ concurred with Maritimes' comment that Order No. 637[38] and related policies foster competition and, for instance, in accordance with these policies, Portland could obtain segmented capacity over Phase III facilities. In conclusion, the ALJ held, the Settlement produces an overall just and reasonable result. The ALJ found that, as the Commission stated in *Trailblazer*, Portland's rates resulting from the Settlement are no higher than the rates which would

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[35] Trial Staff Reply Comments at 7.

[36] The ALJ stated that Phase III-only service has a separate recourse reservation rate of $0.24 per Dth that applies to gas entering the system at the Phase III/Portland interconnect or a path in which the receipt and delivery points are located on the Phase III facilities.

[37] *See* Settlement section 1.6(B); *see also* Firm Shippers Reply Comments at 14; Staff Reply Comments at 8; Maritimes Reply Comments at 34.

[38] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, 65 Fed. Reg. 10,156, 10,169 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,091, at 31,263 (2000), *clarifying*, Order No. 637-A, 65 Fed. Reg. 35,705 (June 5, 2000), FERC Stats. & Regs. ¶ 31,099 (2000), *denying reh'g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000).

have been established through litigation.[39] Approval of this Settlement, the ALJ reasoned, avoids costly litigation, promotes administrative efficiency, and benefits consumers. Balancing the interests involved supports certification of the Settlement as proposed by the parties, he stated, since there are overwhelming benefits of the Settlement. Accordingly, the ALJ held that the public interest will be served by the approval of the Settlement.

63. Finally, the ALJ stated that Maritimes and Firm Shippers are correct that HQ Energy's request for clarification does not signify opposition to the Settlement. Moreover, the ALJ stated that HQ Energy's requested clarifications would disrupt the compromise at the heart of the Settlement and do not appear to improve the Settlement.

64. The ALJ observed that the Settlement does not affect any other cases pending before the Commission. He observed that the Settlement does not resolve any issues of first impression but does involve policy issues concerning competition. He also observed that the Settlement states that the applicable standard of review is the "just and reasonable" standard. Accordingly, for the foregoing reasons, the ALJ recommended that the Commission approve the Settlement.

V. Discussion

A. Procedural Matters

1. Comments

65. Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2005), permits initial comments on offers of settlement and reply comments in response to the initial comments. It does not, however, contemplate subsequent comments. We are not persuaded to accept any subsequent comments as they generally only reiterate previously-expressed views and provide no new information necessary to resolve the issues raised by the subject Settlement. Accordingly, we will reject them.

2. Certification of the Settlement

66. Rule 602(h)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(h)(2) (2005), provides the standards under which the Presiding ALJ may certify a contested settlement to the Commission. In its initial comments, Portland asserted that the Settlement should not be certified because neither of the two alternate bases for certification have been met, i.e., under Rule 602(h)(2)(ii) (ALJ determines that

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[39] *Citing Trailblazer*, 85 FERC at 62,343.

there is no material issue of fact), or Rule 602(h)(2)(iii) (parties concur in the omission of an initial decision or the ALJ determines that the omission of an initial decision is appropriate, and the record contains substantial evidence for the Commission to make a decision on the merits). The ALJ certified the Settlement, finding that both requirements were met. We agree with the ALJ that the Settlement was appropriately certified under the latter criteria.

B. Substantive Matters

1. Standard of Review for a Contested Settlement

67. The Commission has broad authority under section 385.602(h) of its regulations to address contested settlements.[40] The Commission may decide the merits of the contested issues if the record contains substantial evidence on which to base a reasoned decision or if the Commission determines that there is no genuine issue of material fact. If the Commission finds that the record lacks substantial evidence or that the contesting parties or issues cannot be severed, the Commission may establish hearing procedures to supplement the record, or it may take other appropriate action.

68. In *Trailblazer*, the Commission explained at length the standards and procedures it employs in ruling on contested settlements. The Commission stated that, in reviewing a settlement, it must first determine whether the settlement presents an acceptable outcome for the case that is consistent with the public interests represented by the Commission. The Commission acknowledged the value of settlements, but stated that some cases may involve an overriding public interest that outweighs the interest in achieving a settlement. In such instances, the Commission has modified those settlements to be consistent with Commission policy.[41]

69. If the Commission concludes that a contested settlement provides an acceptable outcome for a case, it must next determine the approach it will employ to address the contested issues. In *Trailblazer*, the Commission explained four approaches it has taken for approving a contested settlement despite the objections of the contesting party. Under the first approach, if there is an adequate record, the Commission can address each of the contested issues on the merits, approving the settlement if the Commission finds that each of the contesting party's contentions lacks merit. This approach is appropriate where the issues are primarily policy issues or the parties have agreed that the record is sufficient to decide the issues on the merits, but is not appropriate where some of the contesting

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[40] 18 C.F.R. § 385.602(h) (2005).

[41] 85 FERC at 62,341.

party's contentions have merit. However, the Commission explained that, even where the settlement cannot be approved under the first approach, it may be approved under other approaches. Thus, under the second approach, even if some individual aspects of a settlement may be problematic, the Commission still may approve a contested settlement as a package if the overall result of the settlement is just and reasonable. Under this approach, the Commission will not render a merits decision on whether each element of the settlement package is just and reasonable and will determine whether the overall package falls within a zone of reasonableness.[42] When the Commission takes this approach, it need not find that the settlement rate is exactly the rate the Commission would find just and reasonable on the merits after litigation and need only find that the settlement rate falls within a zone of reasonableness. The Commission will include a finding under this approach that the contesting party would be in no worse position under the settlement than if the case were litigated. Under the third approach, if the settlement is not found to satisfy the just and reasonable standard, the Commission still may approve the settlement where the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interest is too attenuated such that the settlement may be approved under the fair and equitable standard applicable to uncontested settlements.[43] The third alternative usually has included a finding that the contesting party would have another forum in which to raise its contentions, such as through the pipeline's agreement to file a new rate case by a date certain.[44] The fourth alternative is severance of the contesting party, permitting that party to obtain a litigated result, and approving the settlement as to the consenting parties, but only as a last resort.

70. We will address Portland's objections in detail below and evaluate them under the aforementioned *Trailblazer* approaches.

2. Analysis of Parties' Comments

71. We find that, for the reasons discussed by the ALJ in his Certification, in the underlying comments of the consenting parties, and in the discussion below, the Commission finds that the Settlement presents an acceptable outcome for the instant proceeding that is consistent with the public interest protected by the Commission.

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[42] *Id.* at 62,342; 87 FERC at 61,440.

[43] On rehearing, the Commission clarified that, under the third approach, it would not preclude approving a settlement based on an analysis that the interests of the consenting parties, here, shippers and the state regulatory commission, are "congruent" with those of the ultimate consumers. 87 FERC at 61,441.

[44] *Id.* at 62,342-43.

Turning to the four specific alternative approaches to contested settlements, for the reasons discussed below, in the ALJ's Certification and in the comments in support of the Settlement, we find that the Settlement can be approved under the second and third approaches and, accordingly, we will approve the Settlement.

a. Approach No. 1

72. We find that the first approach cannot be applied here to permit the Settlement to be approved over the objections of Portland. The Settlement's Phase III only rates, which Portland opposes, cannot be approved on the merits without remanding the case to continue the hearing proceedings to develop a full record on all issues raised by Maritimes' section 4 rate case. The Phase III rates, which are at the heart of the Settlement, reflect settled cost allocations that impact mainline rates and the parties have all taken different litigation positions on the rate issues raised by Maritimes' rate filing. Further, the numerous other complex and interrelated features of the Settlement, such as fuel rates, escrow arrangements, depreciation rates, treatment of Phase III costs (including deferral of costs), as well as rate moratorium and rate case comeback provisions, do not permit, in our view, the unraveling of certain key rate provisions to make merits findings on those issues without destroying the Settlement package as a whole. We find that Portland's requested modification in the Phase III facilities surcharge rate, while retaining the other benefits of the Settlement, would upset the integrated benefits provided by the Settlement. However, as discussed below, we find that the Settlement may be approved under other *Trailblazer* approaches. Because there is a certain amount of overlap in the criteria used in applying Approach Nos. 2 and 3, and certain findings used to support approval under one approach can be used to support approval under the other approach, we will analyze the Settlement under both approaches.

b. Approach No. 2

73. Turning to the second *Trailblazer* approach, we find that we can apply the second approach here to approve the Settlement because we can find that Portland would be no worse off under the Settlement than if the case were litigated and that the Settlement, as a package, achieves an overall just and reasonable end result within a zone of reasonableness.

74. First, we agree with the ALJ and consenting participants that the Settlement package, including the elimination of the time and expense of litigation, the significant

interim rate reduction (in relation to the filed rates) and refunds,[45] the rate certainty accorded by the Settlement, and the ability of the parties to raise rate design issues in the next rate case Maritimes files, produces an overall just and reasonable result within a zone of reasonableness.

75. Second, we find that Portland would be no worse off under the Settlement than if the case were litigated. While the outcome of litigation is never certain, we find that the record is sufficient to show that 100 percent of the cost of the Phase III facilities could be rolled into Maritimes' general system-wide cost of service, which would produce much higher rates for service on the Phase III facilities than as proposed under the Settlement, which only reflect a partial roll-in of Phase III costs.

76. The Commission's policy is that roll-in of system expansion costs must not result in a subsidization of the project by existing customers.[46] The Commission has explained that projects to improve existing service for existing customers are for the benefit of existing customers and, therefore, the costs of such projects are permitted to be rolled-in, and increasing the rates of existing customers to pay for these improvements is not a subsidy.[47] In its April 13, 2001 Order on preliminary determination finding the Phase III Project to be in the public convenience and necessity, the Commission concluded that the Phase III Project, an extension of the Maritimes facilities, offers a number of substantial benefits to its existing customers.[48] These benefits include access to developing and existing markets, including the Boston market via the interconnection with Algonquin,

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[45] Comparing the various rates at issue on a 100 percent load factor basis, the $1.0713 per Dth/d reservation charge Maritimes proposed in its general section 4 rate case filing for MN365 service in the instant rate case reflected an increase of 54.14 percent over its $0.695 per Dth/d existing rate, which applied whether the service was on the mainline or on the Phase III facilities. In contrast, the Settlement's $0.78 per Dth/d mainline-only MN365 rate reflects an increase of only 12.23 percent from the existing rate, and the Phase III facilities rate ($0.38 per Dth/d computed on a 100 percent load factor basis as described in footnote 14, *supra*) reflects a decrease of 45.32 percent from the existing rate.

[46] *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,746 (1999), *order on clarification*, 92 FERC ¶ 61,094, *order on further clarification*, 92 FERC ¶ 61,094 (2000) (Statement of Policy).

[47] 88 FERC at 61,746 n.12.

[48] 95 FERC at 61,277.

and the elimination of additional transportation charges by Maritimes shippers that previously had to use Tennessee to access markets on Algonquin,[49] as well as the reduction in the additional scheduling and curtailing risks inherent in using multiple downstream transporters. In addition, the Phase III Project provides existing shippers with direct access to proposed markets, such as the electric generation facilities of Sithe Power Marketing, L.P., Southern Connecticut Gas Company, and Southern Energy Kendall L.L.C. In short, the extension of the Maritimes pipeline provides current shippers with a greater opportunity to maximize the use of their capacity on Maritimes. Of critical importance, the record reflects that Maritimes' existing customers have taken advantage of the opportunity to obtain these benefits. At pages 2-3 of the Transmittal Letter to its June 30, 2004 general section 4 rate filing in this case, Maritimes explains: "Each existing long-term shipper was given the option to amend its contract to specify the terminus of the Phase III facilities as another primary delivery point, along with the shipper's existing primary delivery pointy on the system. Each of these shippers has elected to execute a contract amendment which provides for firm, primary service over the Phase III facilities for a quantity of capacity equal to the Maximum Daily Transportation Quantity ("MDTQ") under its firm contract." Accordingly, there appear to be no existing shippers on Maritimes' system who would be subsidizing other shippers if the costs of the Phase III facilities were to be rolled into Maritimes' system-wide cost of service and rates. Thus, roll-in of the Phase III facilities costs under the Commission's Statement of Policy would be supported by the record below. Based on the record evidence, whatever rolled-in, system-wide maximum reservation rates that might have resulted from litigation, and which would have applied to Phase III-only service, would have been much higher than the Settlement's Phase III-only rates reflecting only a partial recovery of Phase III costs that Portland has contested.[50]

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[49] *Id.*

[50] As the ALJ observes in his Certification, at note 5, prior to the instant rate case, the existing rate for service on a primary transportation path covering only the Phase III facilities was the system-wide reservation charge of $0.695 per Dth/d (on a 100 percent load factor basis). In the instant general section 4 rate filing, Maritimes proposed a system-wide rate of $1.0713 per Dth/d reflecting full roll-in of the costs of the Phase III facilities. While we cannot assume that Maritimes' proposed rate ultimately would have been approved had the case continued on to a litigated conclusion, it is apparent from these figures and the record below that the approved system-wide rate reflecting full roll-in of the Phase III expansion would have to be higher than the Settlement's Phase III-only rate.

c. Approach No. 3

77. Turning to the third approach, as discussed below, we agree with the ALJ and find that the benefits of the Settlement outweigh the nature of Portland's objections and that Portland's interest is too attenuated to warrant rejection of the Settlement. Thus, on this separate basis, we find that the Settlement may be approved over the objections of Portland.

78. First, we agree with the ALJ that the Settlement benefits the settling parties with rate concessions they negotiated, and these rate concessions benefit Portland and shippers on its system if they wish to access the Phase III facilities. Portland alone argues that various Settlement provisions are anticompetitive, discriminatory, unjust, unreasonable, and unsupported by record evidence. As found above in our discussion of Approach No. 2, Portland and shippers on its system are better off under the Settlement than if the case were litigated, resulting in a rolled-in system-wide postage-stamp rate. The Settlement is fair and equitable because the benefits all parties receive, namely, rate relief, as well as avoided litigation costs and rate certainty which would not be obtainable through litigation, outweigh the competitive objection raised by the single contesting party, Portland, who is not a shipper on Maritimes. On balance, we find that the Settlement benefits as a package, including rate and other concessions outlined earlier herein, outweigh Portland's objections. Indeed, the parties concur that the below-cost Phase III-only rate was intended to solicit Portland's agreement and provides Portland and Portland's shippers a lower rate, if they become shippers on the Phase III facilities, until Maritimes proposes a new system-wide rate following the Settlement's rate moratorium.

79. Second, although Portland has enough of a potential interest in the proceeding to permit its intervention and participation in the hearing,[51] the commenters and the ALJ have pointed out that Portland never has expressed interest in obtaining capacity on the Phase III facilities and its only interest appears to be that of a competitor pipeline. Moreover, the record does not reflect that its customers have sought Phase III capacity and none protested the Settlement. While Portland alludes to a potential adverse impact on competition, and claims that an even lower Phase III-only rate would result in additional gas supplies from Western Canada and the Dawn Hub via Portland's system, there is no evidence that Portland's shippers consider the interim Phase III-only rate an economic barrier to competition.[52] Indeed, in the Commission's April 13, 2001 certificate order, even though the Phase III Project was certificated with the initial rate set

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[51] Portland or its shippers could seek to become shippers on the Phase III facilities and become subject to the settlement rates.

[52] *See* Trial Staff Initial Comments at 3; Certification at P 42.

at the much higher existing system-wide rate, the Commission found, without objection from Portland or any shippers on its system, that "no pipeline or its captive customers have intervened alleging that either the Phase III or the HubLine Projects are causing a loss of market share. Thus, we find that the proposed projects will have no adverse impact on competing pipelines or on their captive customers."[53] Furthermore, Phase III was built and certificated for Maritimes' shippers, not for the benefit of Portland.

80. Accordingly, we find that any concerns Portland has raised regarding potential anti-competitive or undue discrimination effects of the Settlement are too attenuated and speculative in view of its position as a competitor pipeline. Further, as discussed earlier herein, its objections to the cost basis of the Settlement's Phase III rates need not be addressed with specificity insofar as settlements avoid costly and time-consuming litigation and the parties who will in fact actually be paying the Settlement rates support the Settlement. Moreover, we find that Portland's requested modification in the Phase III facilities surcharge rate, while retaining the other benefits of the Settlement, would upset the integrated benefits provided by the Settlement, including the significant reduction in Maritimes' original filed rates that are currently in effect subject to refund.

d. Approach No. 4

81. Turning to the fourth approach, severance, for the same reasons we approve the Settlement as discussed above, we find that Portland should not be severed. Severance is particularly inappropriate where the contesting party is a competing pipeline, such as Portland. Thus, we find that Portland should not be allowed to pursue its issues in further litigation, and that Portland should be subject to the Settlement rates if it contracts for service on Maritimes.

3. HQ Energy's Request for Clarification

82. Finally, we find that HQ Energy's request for clarification of the Settlement reflects a misunderstanding of the Commission's authority to alter rates in a certificate proceeding, is unwarranted, and ultimately contradicts its lack of opposition to the Settlement rates and procedures, and, therefore, will be rejected. Though not a model of clarity, it appears that HQ Energy's request is concerned that, upon the in-service date of a new expansion, the then-current Settlement rates will become unjust and unreasonable

[53] 95 FERC at 61,228.

and should be lowered.[54] However, it notes, such a rate reduction would not occur until after Maritimes files another general section 4 rate case to reflect the roll-in of expansion costs and the Commission acts on that filing. Further, it notes that no refund authority is provided in the Settlement to order Maritimes to refund these claimed “overcharges” (HQ Energy’s term for the excess of the rates charged from the expansion in-service to the date the Commission further lowers the rate in the subsequent rate case under HQ Energy’s assumed hypothetical). To address its claimed “concern,” it apparently requests that the Commission essentially fill in a gap in the Settlement to clarify a right of the parties to seek lower rates or a different rate design in the future certificate proceeding to take effect upon the in-service date of the expansion rather than having to wait until the ensuing general section 4 rate case.

83. At the outset, the Settlement does not address the parties’ rights to raise issues in a future expansion certificate proceeding. As such, there is nothing in the Settlement to preclude HQ Energy from raising rate issues in such a future expansion certificate proceeding. However, HQ Energy’s proposed clarification apparently is based on the unfounded premise that the Commission somehow could modify Maritimes’ existing Settlement rates in the future expansion certificate proceeding without having to make the requisite section 5 findings based on a full record—a clear violation of *Panhandle*. Its proposal, cast as a mere clarification of the right to raise certain rate issues in a certificate proceeding, is grounded on acceptance of the incorrect premise that such arguments could lead to system-wide rate changes in the certificate proceeding that would take effect upon the in-service date of the new facilities. That we could not “clarify.” The general section 4 rate case filing that Maritimes must make following an expansion where roll-in of expansion costs would result in lower system-wide mainline rates would be the

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[54] HQ Energy hypothesizes a scenario in which Maritimes tripled its system capacity by a mainline expansion, filed a reduced rate of $0.77 per Dth/d on a 100 percent load factor basis, but where the tripling of capacity “ultimately indicated that a cost-based rate of substantially less were just and reasonable.” HQ Energy Initial Comments at 9.

proper forum to raise such issues regarding the rate treatment of expansion costs.[55] The gap in time between the expansion in-service date and the effective date of rates resulting from the rate case is unavoidable and, for that reason, the Settlement cannot be faulted. HQ Energy's proposed clarification would permit it to trump the Settlement's agreement to file a system-wide rate reduction if roll-in of expansion costs would result in such a reduction and, therefore, would unravel a significant component of the Settlement package.

84. Moreover, HQ Energy's speculation about the outcome of a future rate case is outweighed by the benefits of the Settlement, which includes rates that it states it does not oppose[56] and, indeed, are required to be reduced in a rate case following a system expansion where roll-in of the expansion costs would result in lower system-wide rates. Section 1.6(B) of the Settlement provides that, if such an expansion occurs, Maritimes must file a general section 4 rate case reflecting the roll-in of the expansion costs at a rate *less* than the Settlement rate, $0.78 per Dth on a 100 percent load factor basis, for MN365 service. The continuation of a Settlement rate it does not oppose and the replacement thereof with an even lower filed rate is hardly a reason to unravel the Settlement with its proposed clarification because of its speculation that the rate should be reduced even further. In that regard, section 1.6(B) of the Settlement expressly provides that, in the rate case following such an expansion, the parties will be able to raise the issue of whether Maritimes' mainline should be divided into rate zones, a position HQ Energy states it advocated in the hearing proceedings of this case, to reduce its rates.[57] Moreover, the Settlement contains no limitation on any party opposing roll-in of the expansion costs in any general rate proceeding where Maritimes proposes roll-in of the expansion costs, including a rate reduction described in section 1.6(B) of the Settlement.

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[55] Although the parties, Trial Staff, and Maritimes all expect the mainline expansion to precipitate increased throughput from new LNG supplies, thereby lowering the system-wide rates, section 1.9 of the Settlement only requires Maritimes to file a new section 4 rate case if, in fact, roll-in of the new expansion costs would lower its system-wide rates. If not, then Maritimes would have no obligation to file new increased rates, and the existing lower Settlement rates, which HQ Energy does not oppose, would continue in effect. If Maritimes were to file a rate increase in that latter circumstance following the December 31, 2008 termination date of the rate moratorium in section 1.7 of the Settlement, then the rate increase could be suspended, to go into effect subject to refund.

[56] HQ Energy Initial Comments at 7.

[57] *See* Settlement § 1.6(B).

Indeed, HQ Energy misses the fact that, but for the Settlement, Maritimes would have no obligation whatsoever to file another general section 4 rate case. Nor would it have any obligation to file for reduced rates in a new rate case following a major expansion where roll-in of the costs would lower its existing rates. Having found that the Settlement package is overall just and reasonable, the modification of its provisions to insert HQ Energy's proposed clarification, which the Commission would be without authority to enforce in the first place, would upset the integrated benefits provided by the Settlement and, therefore, is rejected.

85. As a final matter, we note that the Settlement defines a "party," for purposes of the Settlement, as "any party on the Official Service List maintained by the Secretary of the Commission for the instant proceeding," which would include HQ Energy. Because HQ Energy has not objected to that status, which binds it to the Settlement's provisions related to "parties," and because we agree with the ALJ and find that HQ Energy has not clearly opposed the Settlement,[58] we will treat it as a non-contesting party.

The Commission orders:

The Settlement is hereby approved, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[58] *See* Certification at P 44.